Press of Fremont Payne, Inc.
[29053]

No. 630

In the Supreme Court of the United States

October Term, 1943

Max Kaplan Bank, petitioner,

v.

National Labor Relations Board

INDEX

CITATIONS

576454—44——1

Cases—Continued. Page

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 690

MAX KAPLAN BROS., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 361–362) is reported in 138 F. (2d) 884. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 335–354) are reported in 45 N. L. R. B. 799.

JURISDICTION

The decree of the court below (R. 363–365) was entered on November 17, 1943. The petition for a writ of certiorari was filed February 8, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13,

1925, and under Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether there is substantial evidence to support findings of the Board, which were sustained by the court below, that petitioner by various antiunion statements, and by the discriminatory discharge of one employee, engaged in unfair labor practices within the meaning of Section 8 (1) and (3) of the Act.

2. Whether the cease and desist provisions of the Board's order, which were sustained by the court below, are proper in view of the Board's findings.

3. Whether the back-pay provisions of the Board's order are proper.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix *infra*, pp. 17–18.

STATEMENT

Upon the usual proceedings, the Board issued its findings of fact, conclusions of law, and order (R. 335–354). The facts, as found by the Board and as shown by the evidence, may be summarized as follows:[1]

[1] In the following statement the references preceding the semicolons are to the Board's findings, and the succeeding references are to the supporting evidence.

In June 1941, within a day or two of the initiation of an attempt by the International Ladies' Garment Workers Union to organize petitioner's employees, Forelady Lombardi, general supervisor over petitioner's 500 women employees, instructed Norma de Filippi and Louise Doran, employees working under her supervision, to dissuade other employees from joining the organization, warning that if a union gained a foothold in petitioner's plant, petitioner would cease operations (R. 339–340; 52–54). Both Doran and de Fillipi were so-called "floor girls." They each distributed material and collected the work of a group of approximately 30 girls who worked together at a large table (R. 340; 11, 52).

In April 1942, another labor organization, the Textile Workers Union of America, herein called the Union, began an organizational campaign at petitioner's plant (R. 340; 54). On the evening of April 24, de Fillipi and Doran attended a union meeting at the request of the girls in their respective groups (R. 341; 54–55, 57). On the following morning, Forelady Lombardi told de Filippi that she knew the two girls had attended the meeting and warned her that if Max Kaplan, one of petitioner's partners, found out that they were union members, they would be discharged (R. 341; 59–61, 303–304).

On April 27, Doran openly and actively solicited union members and distributed union ap-

plication cards among petitioner's employees (R. 343; 100–105, 84–85). Doran was at this time in charge of a table of 28 girls located next to de Filippi's table at one end of the plant, at a considerable distance from Lombardi's desk (R. 343; 63). On May 5, Lombardi abruptly moved Doran's table to a place only one table removed from her own desk, and next to the station of the senior floor girl (R. 343; 66–67, 123). Such a move was not customary in the plant, and two witnesses testified that they heard Lombardi, at the time it was made, say to the senior floor girl in reference to Doran and her group, "I have them up here and keep an eye on them" (R. 343–344; 67–69, 123, 142–143).

On the following morning, May 6, a floor girl named Rubino, whose group performed the next operation on material finished by Doran's girls, went over to Doran's table and requested material. Doran told Rubino that she was busy at that moment and suggested that Rubino take the material which she needed, as she had often done in the past, from the table where such work was customarily kept. Rubino, however, instead of doing this, complained to Lombardi that Doran had refused to give her material. Lombardi, without inquiring into the situation or herself directing Rubino to take the needed material, her customary practice under such circumstances, summoned Doran to her desk and before Doran

had reached it, loudly upbraided her for telling Rubino she had no time to supply Rubino with material. (R. 344–347; 72–80, 124, 194–196.) Shortly thereafter, she approached Doran at her work table, and after charging her with being "very fresh," and refusing to accept Doran's repeated explanation that she had been busy collecting work at the time of Rubino's request, revealed the real basis for her anger by exclaiming, "Do you think you are smart? Don't you think I know you and Rubino stabbed me behind my back?" (R. 346; 72–73). Doran replied that it was Lombardi who "did the stabbing"; that Lombardi had been watching her ever since she attended "something" *i. e.*, the union meeting (R. 346–347; 74). To this Lombardi retorted, "The trouble with you is that you think you have somebody back of you * * * I am not scared of you or anyone else that is in back of you." Doran protested that she had nobody "in back of" her. Lombardi replied, "You are fired * * * I have gotten rid of you and the next one I will get rid of is Norma and everybody connected with this" (R. 347; 74–75).

The Board found that Lombardi's remarks and warnings concerning the International Ladies' Garment Workers Union in June 1941 constituted interference, restraint and coercion in violation of Section 8 (1) of the Act (R. 340). The Board found further that the discharge of Doran

constituted a violation of Section 8 (1) and (3) of the Act (R. 349, 352).

Upon the foregoing findings, the Board ordered that petitioner (1) cease and desist from discouraging membership in the Union or any other labor organization of its employees by discrimination in regard to the hire or tenure of employment or any term or condition of employment of its employees; (2) cease and desist from in any manner interfering with, restraining, or coercing its employees in the exercise of their rights as guaranteed in Section 7 of the Act; (3) reinstate Doran to her former or to a substantially equivalent position, in case Doran makes application for reinstatement within 5 days after the date of issuance of the Board's order; and (4) award Doran back pay, in case she so applies for reinstatement, from the date of her discharge to the date of her reinstatement, or if she does not so apply for reinstatement, from the date of her discharge to the date she obtained the employment she held at the time of the hearing (R. 352–353).

On February 15, 1943, the Board filed in the court below a petition to enforce the Board's order. On November 17, 1943, the court entered a decree enforcing the Board's order in full (R. 363–365).

ARGUMENT

1. The issue of the substantiality of the evidence supporting the Board's findings (Pet. 2–4,

7, 9, 13, 16, 24–27) presents no question of general importance. Furthermore, the detailed facts found by the Board and summarized in the Statement, *supra,* pp. 2–5, amply support its ultimate findings, as the court below held (R. 361). None of these findings rests upon hearsay evidence, as erroneously contended by petitioner (Pet. 16); they are grounded upon direct evidence of petitioner's hostility to the Union expressed through its supervisory employee, Frances Lombardi, in June 1941, and on May 5 and 6, 1942. The hearsay testimony concerning Lombardi's knowledge of Doran's participation in the union meeting of April 24, 1942, referred to by petitioner, merely corroborates and strengthens the conclusion, reasonably drawn from the direct evidence, that petitioner was well aware of the identity of the leaders of the union activity in the plant. It is to be noted that this hearsay testimony, while credited by the Board, is used only in the section of the Board's findings entitled "Background" (R. 339–342).

2. Petitioner contends (Pet. 7–9, 13, 15–16, 19–23) that the provision of the order which restrains it from in any manner infringing the rights guaranteed to employees under Section 7 of the Act is invalid under the principles enunciated in *National Labor Relations Board* v. *Express Publishing Co.,* 312 U. S. 426. But in the *Express Publishing* case the Court laid down

the rule that "Having found the acts which constitute the unfair labor practice the Board is free to restrain the practice and other like or related unlawful acts. * * * The breadth of the order, like the injunction of a court, must depend upon the circumstances of each case, the purpose being to prevent violations, the threat of which in the future is indicated because of their similarity or relation to those unlawful acts which the Board has found to have been committed by the employer in the past" (312 U. S. at 436–437). The Court's refusal in that case to uphold a broad cease and desist order, similar to the contested order in the instant case, was predicated upon the peculiar facts of that case; there, as the Court pointed out, the unfair labor practice was confined exclusively to a refusal to negotiate with the Union, a violation of Section 8 (5) of the Act. And while the Court recognized that a violation of Section 8 (5) also technically constituted a violation of Section 8 (1), it distinguished such a violation from the case where the Board found unfair practices which constituted separate and independent violations of Section 8 (1), or which threatened to continue or be followed by similar practices in the future. The instant case presents unfair labor practices of the latter type. The threats and antiunion actions of petitioner's supervisor, wholly unrestrained by petitioner's higher officials, constituted

independent violations of Section 8 (1) of the Act; and there is, moreover, ample basis in the record for the belief that other similar violations would occur in the future unless restrained. The form of order enforced below was therefore wholly proper under the rule enunciated in the *Express Publishing* case. Subsequent to its decision in that case this Court has enforced provisions identical to the one here in controversy. *National Labor Relations Board* v. *Automotive Maintenance Machinery Co.*, 315 U. S. 282; *National Labor Relations Board* v. *Electric Vacuum Cleaner Co.*, 315 U. S. 685; and *National Labor Relations Board* v. *Nevada Consolidated Copper Corp.*, 316 U. S. 105. Contentions similar to that raised by petitioner were presented to this Court by the employers in *Owens-Illinois Glass Co.* v. *National Labor Relations Board*, 123 F. (2d) 670 (C. C. A. 6), certiorari denied, 316 U. S. 662; *Wilson & Co.* v. *National Labor Relations Board*, 126 F. (2d) 114 (C. C. A. 7), certiorari denied, 316 U. S. 699; *National Labor Relations Board* v. *Algoma Net Co.*, 124 F. (2d) 730 (C. C. A. 7), certiorari denied, 316 U. S. 706; and *Butler Bros.* v. *National Labor Relations Board*, 134 F. (2d) 981 (C. C. A. 7), certiorari denied, No. 274, this Term.

Despite petitioner's assertions (Pet 7–9, 15–16, 17–23), there is no conflict between the various circuit courts of appeals as to the propriety

of enforcing provisions identical with the one here in question where, as in the instant case, the record discloses an independent violation of Section 8 (1) of the Act. In such cases, the provisions are consistently enforced. *National Labor Relations Board* v. *Reed & Prince Mfg. Co.*, 118 F. (2d) 874, 891 (C. C. A. 1), certiorari denied, 313 U. S. 595; *National Labor Relations Board* v. *Air Associates*, 121 F. (2d) 586, 592 (C. C. A. 2); *National Labor Relations Board* v. *Van Deusen*, 138 F. (2d) 893, 895 (C. C. A. 2); *Roebling Employees Assn.* v. *National Labor Relations Board*, 120 F. (2d) 289, 296 (C. C. A. 3); *National Labor Relations Board* v. *Weirton Steel Co.*, 135 F. (2d) 494, 495–496 (C. C. A. 3); *American Enka Corp.* v. *National Labor Relations Board*, 119 F. (2d) 60, 63 (C. C. A. 4); *National Labor Relations Board* v. *Entwistle Mfg. Co.*, 120 F. (2d) 532, 536 (C. C. A. 4). While there are early decisions in the Fifth, Sixth, Seventh, Eighth, and Ninth Circuits, and in the Court of Appeals for the District of Columbia, deleting or modifying the broad cease and desist order despite the presence of an independent violation of Section 8 (1), more recent decisions in subsequent cases in each of these circuits have enforced such orders. *Jacksonville Paper Co.* v. *National Labor Relations Board*, 137 F. (2d) 148 (C. C. A. 5), certiorari denied, No. 342, this Term; *National Labor Relations Board* v. *Montag Brothers, Inc.*,

decided February 3, 1944 (C. C. A. 5); *National Labor Relations Board* v. *Times-Picayune Publishing Co.*, 130 F. (2d) 257, 259 (C. C. A. 5); *National Labor Relations Board* v. *Burke Machine Tool Co.*, 133 F. (2d) 618 (C. C. A. 6); *National Labor Relations Board* v. *Metal Mouldings Corp.*, decided April 6, 1943 (C. C. A. 6); *National Labor Relations Board* v. *Sunbeam Electric Mfg. Co.*, 133 F. (2d) 856, 861–862 (C. C. A. 7); *Rapid Roller Co.* v. *National Labor Relations Board*, 126 F. (2d) 452, 461 (C. C. A. 7), certiorari denied, 317 U. S. 650; *National Labor Relations Board* v. *Jasper Chair Co.*, 138 F. (2d) 756 (C. C. A. 7), certiorari denied, No. 615, this Term; *David Onan* v. *National Labor Relations Board*, decided January 6, 1944 (C. C. A. 8); *National Labor Relations Board* v. *Hollywood-Maxwell Co.*, 126 F. (2d) 815, 819 (C. C. A. 9); *National Labor Relations Board* v. *Germain Seed & Plant Co.*, 134 F. (2d) 94, 99 (C. C. A. 9); *Bethlehem Steel Co.* v. *National Labor Relations Board*, 120 F. (2d) 641, 647 (App. D. C.).[2]

[2] The circuit courts of appeals are in disagreement as to the propriety of broad cease and desist provisions in cases in which, as in the *Express Publishing* case, there occur only technical violations of Section 8 (1) of the Act, *i. e.*, where there are violations of Section 8 (2), (3), or (4) singly or in combination, but in which there is no separate violation of Section 8 (1). This question is not in issue in the instant proceeding. The cases cited by petitioner in which other circuit courts of appeals limited the scope of such an order (Pet. 8) are, with a single exception, cases of mere technical violations of Section 8 (1), and hence are not in point

Nor is petitioner correct in asserting (Pet. 8–9, 18) that the Circuit Court of Appeals for the Second Circuit is divided concerning the propriety of the broad cease and desist orders in cases such as this, containing independent violations of Section 8 (1). In sustaining the broad order in *National Labor Relations Board* v. *Air Associates, Inc.*, 121 F. (2d) 586, that court expressly noted the independent violation of Section 8 (1) in that case. In its recent decision in *National Labor Relations Board* v. *Standard Oil Co.*, 138 F. (2d) 885, that court, in discussing the doubt of two of its six members, Judges Learned Hand and Chase, concerning the propriety of the broad order, squarely based such doubt on the absence of an independent violation of Section 8 (1) in that case, expressing the opinion (p. 888) that "to issue an injunction under Section 8 (1) the employer

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here. Thus *National Labor Relations Board* v. *Newark Morning Ledger Co.*, 120 F. (2d) 262 (C. C. A. 3), contains independent violations only of Section 8 (3); *National Labor Relations Board* v. *Burry Biscuit Corporation*, 123 F. (2d) 540 (C. C. A. 7), of only Section 8 (2); *National Labor Relations Board* v. *Grower-Shipper Vegetable Ass'n*, 122 F. (2d) 368 (C. C. A. 9), of only, in the opinion of the court, Section 8 (5); *National Labor Relations Board* v. *Continental Oil Co.*, 121 F. (2d) 120 (C. C. A. 10), of only Section 8 (2). While there are independent violations of Section 8 (1) in *National Labor Relations Board* v. *Tex-O-Kan Flour Mills Co.*, 122 F. (2d) 433 (C. C. A. 5), it is to be noted that this case was decided in 1941. Since that date the Fifth Circuit Court of Appeals has consistently enforced the broad cease and desist provisions in cases of its type (see *supra*, pp. 10–11).

must have done something not specifically mentioned in other subdivisions of Section 8." The instant case does, of course, contain such an independent violation of Section 8 (1). In cases decided at the same time as or since the *Standard Oil* case, including the instant case, that court has upheld the broad provisions of the order, with or without reference to its discussion of this point in the *Standard Oil* case. *National Labor Relations Board* v. *American Laundry Machine Co.,* 138 F. (2d) 889; *National Labor Relations Board* v. *Elvine Knitting Mills,* 138 F. (2d) 633; *National Labor Relations Board* v. *Fitzpatrick & Weller, Inc.,* 138 F. (2d) 697; *National Labor Relations Board* v. *Van Deusen,* 138 F. (2d) 893 (specifically noting the independent violation of Section 8 (1)); *National Labor Relations Board* v. *Louis F. Cassoff,* decided December 20, 1943; *National Labor Relations Board* v. *Regal Knitwear Company,* decided February 15, 1944; *National Labor Relations Board* v. *A. Sartorius & Co., Inc.,* decided January 31, 1944.[3] It may be noted in this connection that the orders in the *Nevada Consolidated Copper Co.* case,

[3] A study of the decisions of the Second Circuit Court of Appeals reveals that in the early part of 1941, shortly after the decision of this court in the *Express Publishing* case, the members of that court were divided concerning the propriety of the broad cease and desist order in any type of Board case. In *National Labor Relations Board* v. *Moench Tanning Co., Inc.,* 121 F. (2d) 951, 954, argued April 7, 1941, the court, composed of Judges Learned Hand, Augustus Hand and Chase,

supra, enforced by this Court, and the *Wilson Co.* case, in which certiorari was denied (*supra,* p. 9), occurred in cases involving respectively violations of 8 (3) and 8 (2) without independent violations of Section 8 (1).

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stated that the court as then constituted did not approve the broad order. In *National Labor Relations Board* v. *Federbush Co., Inc.*, 121 F. (2d) 954, 957, argued April 8, 1941, the court, composed of Judges Learned Hand, Swan and Chase, stated that a majority of the court as then constituted disapproved the broad order. In *National Labor Relations Board* v. *Air Associates, Inc.*, 121 F. (2d) 586, 592, argued June 9, 1941, the court, composed of Judges Swan, Clark and Frank, approved the broad order, specifically pointing out that the case contained independent violations of Section 8 (1), thereby, in the opinion of the court, distinguishing the case from the *Express Publishing* case. The decision in the *Air Associates* case was handed down a week before the decisions in the *Moench Tanning* and *Federbush* cases and the court in the two latter cases felt constrained, although against its will, to follow the precedent established. However, it is apparent that this division of opinion no longer exists in connection with cases containing an independent violation of Section 8 (1). In the *Standard Oil* case, decided November 1, 1943, the court, composed of Judges L. Hand, Chase and Clark states (138 F. (2d), at 888) "It would follow that to issue an injunction under Section 8 (1) the employer must have done something not specifically mentioned in the other subdivisions of Section 8," and bases its earlier disapproval of the broad provision on the ground that none of the earlier cases (mentioned above) contained independent violations of Section 8 (1) (a ground which, we believe, represents a present misapprehension of the facts in these cases). A comparison of the majority opinion of the court and the concurring opinion of Judge Clark seems to reveal an existing difference of opinion concerning the propriety of the broad provision in cases where no independent violation of Section 8 (1) is present. That issue is not, however, presented in the instant case.

3. The back-pay provisions of the Board's order present no issue of general importance. Paragraph 2 (b) of the order, to which petitioner objects (Pet. 27–28), provides that in case Doran does not seek reinstatement with petitioner within five days of the issuance of the order, petitioner shall make her whole from the time of her discharge to the time she received work elsewhere. The order is eminently fair and reasonable. At the time of the hearing Doran had been employed at a higher wage but in a probationary status at another plant. She hoped to be retained there as a permanent employee at the end of her probationary period; only in case she was not so retained would she desire reinstatement by petitioner. The Board's order fully effectuated the policies of the Act by providing that, in case she did not wish reinstatement (*i. e.,* in case her present employment at a higher wage proved permanent), petitioner would be required to make her whole only for the actual losses she incurred during her period of unemployment. Petitioner contends (Pet. 28) that the back-pay period should be measured, not to the time she accepted her present employment, but to the time of the offer of reinstatement. The reason for this contention is, as the court below pointed out, petitioner's desire to benefit from the fact that the rate of her earnings in the new job was larger than that paid by petitioner, by using the excess as a credit

to reduce the amount of back pay due her for her period of unemployment. In rejecting petitioner's contention the court below stated, "when she was not reinstated, the wrong so far as it can be measured in dollars ceased as soon as she began to earn as much elsewhere. The [petitioners] were no more entitled to any part of her wages during the probationary period than thereafter" (R. 362). Whether or not Doran accepts reinstatement, petitioner will not be required to pay her back wages with respect to any period for which it may not take credit for her earnings; nor is there any claim of a willful refusal of employment. Contrary to petitioner's contention (Pet. 28), the cases relied upon are thus not in point.

CONCLUSION

The decision below, sustaining the Board's order, is correct, and presents neither a conflict of decisions, nor any question of general importance. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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MARCH 1944.